

APPEAL NO. 022135
FILED OCTOBER 4, 2002

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on May 30 and July 31, 2002. The hearing officer determined that the respondent (claimant) did not sustain a compensable injury on (alleged injury), but was instead injured on _____; that the claimant timely notified his employer of his injury; and that the claimant had disability from February 8, 2001, through May 26, 2001, as a result of the _____, injury. The hearing officer further found that although the carrier had asserted that there was no coverage on _____, there was indeed coverage due to the failure to effectuate a cancellation of the policy as required by the 1989 Act.

The carrier appeals, arguing that coverage was not in issue nor was the occurrence of an injury on _____, and that the hearing officer consequently erred by determining these matters against it. The claimant responds and asks for affirmance. The determination that the claimant gave timely notice of his injury to his employer has not been appealed.

DECISION

Affirmed.

The claimant had a back injury for which he had surgery performed in March 2001. The claimant agreed that he first experienced incapacitating pain from the back injury on _____, after unloading cartons at work, but argued that this related back to a lifting injury he sustained on (alleged injury), when he was carrying umbrella weights up a customer's stairs. However, nearly all of the contemporaneous records from his medical treatment identified _____, as the date of injury. The heart of the carrier's defense was that the claimant was really injured on this date but changed his date of injury to (alleged injury), after it became evident that there was no coverage. The carrier stated that but for the lack of coverage on (alleged injury), it would not be disputing that injury.

Significantly, it was the carrier who, upon direct examination of its own witnesses from the employer, inquired as to whether the employer's representatives were surprised to discover that the employer had no coverage on _____. There was agreement from the employer's witness that this was a surprise because premiums had been timely paid and they were not notified until after the claimant's claim that there was no coverage.

At the end of the first session of the CCH, the hearing officer noted that the matter of cessation of coverage had been directly raised and it would be necessary for her to resolve this matter in order to consider the evidence on the issues. The hearing

was reconvened so that evidence purporting to show no coverage could be introduced. No objection was made by the carrier's representative at this session or in the reconvened session of the CCH that the hearing officer was exceeding the issues before her. In fact, the carrier continued to argue that the actual injury date was _____, and that the claimant had changed his claimed date of injury to (alleged injury), only after he discovered the lack of coverage for the (alleged injury) injury.

ADDITION OF COVERAGE AND (alleged injury date) INJURY ISSUES

The hearing officer added the issues of coverage and the occurrence of a _____, injury to her decision as matters that had been "actually litigated." Under the facts of this case, we cannot agree that this was error.

The statement of the carrier's position on the benefit review conference report was that the employer did not have coverage in January 2001 and that the (alleged injury), date of injury was therefore an attempt by the claimant to relate his injury back to a date of coverage. As coverage was at the heart of the carrier's dispute over the injury, and in fact pertinent evidence on this subsumed issue was raised by the carrier, we cannot agree that it was necessary for it to be reported as a separate issue in order for the hearing officer to consider the matter. The hearing officer did not so much "add an issue" as determine an essential matter raised as a defense to the claim. See Texas Workers' Compensation Commission Appeal No. 992396, decided December 13, 1999; Texas Workers' Compensation Commission Appeal No. 941171, decided October 17, 1994.

Concerning the date of the injury sustained by the claimant, the Appeals Panel has before noted that there are no pleadings in workers' compensation proceedings and the hearing officer may find a date of injury consistent with the evidence and the injury that was actually litigated even though the stated issue identifies another date. Texas Workers' Compensation Commission Appeal No. 971009, decided July 14, 1997.

_____, INJURY AND DISABILITY

Although the carrier asserted at the CCH that the claimant was actually injured on _____, it now on appeal asserts that he did not sustain a compensable injury on that date. We affirm the hearing officer's determination that the claimant was injured on _____, despite the claimant's contention at the CCH that he was injured on (alleged injury). We have long held that the claimant's testimony, as an interested party, only raises an issue of fact, Escamilla v. Liberty Mutual Insurance Co., 499 S.W.2d 758 (Tex. Civ. App.-Amarillo 1973, no writ), that may be believed or disbelieved in whole or in part. The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). After review of the record and the complained-of determinations, we have concluded that there is sufficient legal and factual support for the hearing officer's decision that the claimant was injured on _____, and had disability as a result of that injury. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

EXISTENCE OF COVERAGE ON _____

Section 406.008 provides the notice procedure that must be followed when the insurance carrier cancels or fails to renew coverage. Section 406.008(c) specifically provides that the failure of the insurance company to give the required notices extends the policy “until the date on which the required notice is provided to the employer and the [Texas Workers’ Compensation] commission” The notice is to be delivered in person or by certified mail to the employer and to the Commission, not later than the 30th day before the date on which the cancellation takes effect, or the 10th day if the insurance policy is cancelled due to specified reason in subsection (b) of this section.

In the present case, an attempted cancellation was the action under review because the policy period ran from November 9, 2000, through November 9, 2001. For the reason of “non-compliance- premium audit,” the carrier sought by a notice ostensibly dated December 8, 2000, to cancel the policy effective January 14, 2001. The carrier’s representative pointed out that failure to pay premium was not the basis for the attempted cancellation.

However, the hearing officer held that the documents presented by the carrier at the second session of the CCH fail to establish compliance with Section 406.008. The record supports this determination. The notice is shown as having been sent certified mail but no green card showing actual receipt by the employer (or the Commission) was proven. Indeed, a memorandum from the insurance agent states that the employer apparently never got the notice. This memorandum states that there was no coverage from January 10, 2001, a date not cited in any other documents, through April 19, 2001. The only documents shown with a Commission date-stamp is the renewed coverage notice. The carrier has the burden of proving compliance with Section 406.008. Texas Workers' Compensation Commission Appeal No. 981597, decided August 19, 1998 (Unpublished). Given these facts, the hearing officer supportably found that coverage was extended for failure to comply with the notice provisions of Section 406.008. See Texas Workers' Compensation Commission Appeal No. 950377, decided April 25, 1995, and Texas Workers' Compensation Commission Appeal No. 951912, decided December 20, 1995 (Unpublished).

We affirm the hearing officer's decision and order.

The true corporate name of the insurance carrier is **TEXAS MUTUAL INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**MR. RUSSELL R. OLIVER, PRESIDENT
221 WEST 6TH STREET
AUSTIN, TEXAS 78701.**

Susan M. Kelley
Appeals Judge

CONCUR:

Judy L. S. Barnes
Appeals Judge

Philip F. O'Neill
Appeals Judge